85-715

Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD L. MOORE,

Petitioner,

v.

DAVID LAVICKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CRIMINAL AND
FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

October, 1985

7/p

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD L. MOORE,

Petitioner,

v.

DAVID LAVICKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CRIMINAL AND
FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

October, 1985

QUESTION PRESENTED

1. Whether a prosecutor, who fails to follow state procedure for determining the ownership of stolen property, and who, as a result, allows victims of a theft to recover their property without a court hearing, deprives the thief (also claiming ownership) of property without due process of law where the State has in place post-deprivation remedies to consider the thief's claim.*

---

*Parties to the action below were David Lavicky, Plaintiff, Bob Burnett, Deputy Sheriff of Garfield County, Sam Otis, Deputy Sheriff of Alfalfa County, Delmar Coppock, Sheriff of Alfalfa County, Edward L. Moore, Assistant District Attorney, Alfalfa County, and Ray Pickle, Sheriff of Garfield County.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Opinions Below 2

Relevant Constitutional Provision . . 2

Statement of the Case 4

A. Procedural History. 4

B. Statement of the Facts. 5

Reasons For Granting Petition 15

I.

THE COURT BELOW DECIDED THIS CASE ON A THEORY SPECIFICALLY REJECTED BY THIS COURT IN HUDSON V. PALMER. . . 15

II.

THE OPINION BELOW IS IN CONFLICT WITH SIMILAR AUTHORITY FROM THE SIXTH CIRCUIT. 27

Conclusion 29

TABLE OF AUTHORITIES

Page

Cases Cited

Augustine v. Doe, 740 F.2d 322, 327-29 (5th Cir. 1984). 19

Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 n. 4 (10th Cir. 1985). . . . 25,26

Hudson v. Palmer, 468 U.S. ___, 104 S.Ct. 3194, 3204 (1984) 15,16, 17,18, 20,24, 27,28, 29,30

Ingraham v. Wright, 430 U.S. 651 (1977). 25,26, 27,28

Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985). 2,17, 18,19, 21,22, 27

Lehman v. Weis, 454 U.S. 807 (1981). 27

Logan v. Zimmerman Brush Company, 455 U.S. 422, 436-37 (1982) . . . 19,20

Lusby v. T.G.& Y. Stores, 749 F.2d 1423, 1434 (10th Cir. 1984) . . . 25,26

Cases Cited (Cont.)

	Page
Parratt v. Taylor, 451 U.S. 527, 541 (1981).	15,18, 19,20, 27,28, 29,30
Prock v. District Court of Pittsburg County, 630 P.2d 722, 779 (Okl. 1981)	23
Wagner v. Higgins, 754 F.2d 186 (6th Cir. 1985)	28,29
Weiss v. Lehman, 676 F.2d 1320, 1323 (9th Cir. 1982).	27
Wolfenbarger, d/b/a Shady Sam's Pawn Shop v. Williams, et al., No. 83-2331, slip. op. at 15-17 (10th Cir. Sept. 26, 1985).	21

Statutes Cited

	Page
28 U.S.C. § 1254(1).	2
28 U.S.C. §§ 1331 and 1343(3).	4
42 U.S.C. § 1983	4
51 O.S. Supp. 1978, § 153.	3,22
51 O.S. Supp. 1978, § 162.	3,22
60 O.S. 1981, § 347.	24
74 O.S. Supp. 1976, § 20f.	4,23
22 O.S. 1981, §§ 1321-1322	13,18

Constitutional Provisions Cited

United States Constitution, Fourteenth Amendment.	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

EDWARD L. MOORE,

Petitioner,

v.

DAVID LAVICKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Edward L. Moore, former Assistant District Attorney, of Alfalfa County, Oklahoma, by and through the Attorney General of the State of Oklahoma, Michael C. Turpen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit for which this petition is sought is reported as Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985). This Opinion was filed on March 19, 1985. A timely petition for rehearing en banc was denied on July 26, 1985. The Court of Appeals recalled its mandate pending filing of this Petition for Writ of Certiorari. The text of the Court of Appeals' Opinion herein is attached hereto as Appendix A. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 51 O.S.Supp.1978, § 153 states in its entirety:

> Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee.

Title 51 O.S.Supp.1978, § 162 states in pertinent part:

> **§162. Constitutional or statutory rights, privileges or immunities-Violation by employee-Defending-Indemnification-Right of recovery-Punitive or exemploary damages**
>
> A. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:
>
> . . .
>
> 2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee; and any costs or fees, for a violation of property

> rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment.

Title 74 O.S.Supp.1976, § 20f states in pertinent part:

> F. Any officer or employee who acts outside of the scope of his official authority shall be liable in damages in the same manner as any private citizen.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This case was originally a civil rights action filed pursuant to 42 U.S.C. § 1983 in which the Plaintiff asserted federal jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343(3). The issues asserted herein were first raised by the Defendants below in a Motion for Summary Judgment filed in the United States District Court for the Western District of Oklahoma on August 31, 1981. These issues were renewed at trial and a Motion for Directed Verdict. The federal

question presented to this Court was considered and decided by the Court of Appeals below.

STATEMENT OF THE FACTS

Your Petitioner, Edward L. Moore, was an Assistant District Attorney in Alfalfa County, Oklahoma, who prosecuted the Respondent herein for larceny of a motor vehicle. As will be shown below, the evidence at the criminal trial indicated that the Respondent stole a certain pick-up truck and incorporated parts from that truck, including the engine and transmission, in his own truck. At the conclusion of the criminal trial, your Petitioner, Ed Moore, allowed the victims of the larceny to recover their stolen property by self-help. Neither Ed Moore nor any of the other Defendants below used the applicable state procedure for determining the ownership of stolen property. The Respondent did not use any of the available state remedies to either

secure property he claimed was his or to recover damages for its return to the rightful owners. In the recitation of the facts which follow the parties will be referred to by their federal trial court designations. Transcript references are to the transcript of the federal trial.

On January 19, 1979, the Plaintiff herein, David Lavicky, stole from Bruce and Ronnie Eckhardt of Cherokee, Alfalfa County, Oklahoma, a pickup truck which was parked in the front yard of the Eckhardt residence (TR. 363-64). At the time of the theft, the Plaintiff was accompanied by two other young men, Tony Joslin and Gerald Coleman. The three men had been to a nightclub in a nearby town when the Plaintiff separated from Joslin and Coleman in order to steal the Eckhardt truck (Tr. 363-64). Later, the Plaintiff told Coleman that he was taking the stolen truck to Mootz Garage where he

was going to "strip it out" (Tr. 364-65). By "strip it out," Coleman understood the Plaintiff to mean that he was going to take the engine, the transmission, the wheels, and the seats from the Eckhardt truck and use them in his own pickup (Tr. 365). At a later time, Coleman saw the stolen engine and transmission in the Plaintiff's pickup truck (Tr. 372). He saw the engine on the back of the Plaintiff's truck and later afterwards when it had been installed in the truck itself. He also saw the stolen transmission in the Plaintiff's truck (Tr. 374-76). Then, on or about March 8, 1979, Gerald Coleman, along with his father, went to a Deputy Sheriff of Garfield County, Oklahoma, Bob Burnett, and admitted to Deputy Burnett that Gerald Coleman had been involved in the theft of the truck from Cherokee, Oklahoma (Tr. 370-71).

Another young man, Gary Wayne Mootz, in late January, 1979, helped the Plain-

tiff "strip out" the stolen Eckhardt 1959 Chevrolet pickup in Mootz' father's garage in Enid, Oklahoma (Tr. 383-84). The two young men pulled out the motor and transmission and the wheels and seat and took all of the parts off the stolen Eckhardt pickup which were still any good (Tr. 384). Before stripping the Eckhardt pickup, Mootz went with the Plaintiff to pick up the stolen truck at the Plaintiff's trailer house in Enid, Oklahoma (Tr. 384). At the time the truck was stripped, the Plaintiff told Gary Mootz that he was stripping it in order to take the motor, transmission and wheels to put on the Plaintiff's own 1964 black Chevrolet pickup truck (Tr. 385). After stripping the stolen Eckhardt pickup truck, Mootz and the Plaintiff towed the stolen truck outside of Enid, Oklahoma, and pushed it into a dry river bed. There the Plaintiff set the stolen truck on fire (Tr. 385-86). Later, on or about

March 8 or 9, 1979, Gary Mootz went to the Sheriff's Office of Garfield County, Oklahoma, where he explained his involvement with the stolen truck to authorities (Tr. 386).

Garfield County Deputy Sheriff Bob Burnett received the reports of Gerald Coleman and Gary Mootz regarding their involvement with the stolen Eckhrdt truck (Tr. 242-45). Thereafter, Burnett arrested the Plaintiff pursuant to arrest warrant on March 15, 1979 (Tr. 247-48). At the time of the arrest, Burnett saw under the raised hood of the Plaintiff's pickup a small block Chevrolet engine and Holly carburetor matching the description of parts stolen from the Eckhardt truck (Tr. 249). By the time the Plaintiff was booked into the Garfield County Jail, it was approximately 8:00 p.m. on the evening of March 15, 1979 (Tr. 251). Deputy Burnett returned to the Plaintiff's home and arranged to tow the Plaintiff's truck

to a safe location on the following day, March 16, 1979 (Tr. 252). Later that day, Undersheriff Sam Otis from adjoining Alfalfa County, Oklahoma, came to Enid, in Garfield County, Oklahoma, and brought the actual arrest warrant for the Plaintiff, which had been secured the previous day, and inspected the Plaintiff's truck along with Bruce Eckhardt, the owner of the stolen parts which had been incorporated into the Plaintiff's truck (Tr. 252-53). The Plaintiff was transported to the Alfalfa County Jail on March 16, 1979, in order to answer to the charge of Larceny of an Automobile based upon the theft of the Eckhardt truck (Tr. 18).

The Defendant Ed Moore was not present at the seizure of the Plaintiff's truck (Tr. 328). After the Plaintiff was taken to Alfalfa County for prosecution, the Sheriff of Alfalfa County had custody of the Plaintiff's pickup truck (Tr. 350). Ed Moore, as Assistant District

Attorney, successfully prosecuted the Plaintiff for Larceny of a Motor Vehicle at trial, which began on November 9, 1979. Ed Moore was also the Assistant District Attorney who handled the Plaintiff's sentencing on December 18, 1979.

After the Plaintiff's sentencing on December 18, 1979, his attorney asked Ed Moore for the return of the Plaintiff's pickup truck, which contained the stolen Eckhardt engine and transmission (Tr. 131-32). This conversation took place near the Court Clerk's office in the Alfalfa County Courthouse (Tr. 132). Ed Moore declined to return the pickup until the complaining witnesses, the Eckhardts, had an opportunity to retrieve the parts from it which had been stolen from them (Tr. 133). At that time, Ed Moore suggested that the Plaintiff file a replevin action to recover his pickup (Tr. 308). The Plaintiff's criminal trial counsel never suggested to Ed Moore that the

stolen Eckhardt parts actually belonged to the Plaintiff (Tr. 149). Nor did the Plaintiff's counsel renew his earlier motion for return of the pickup after trial. (307). No replevin action was filed, nor was any action filed against any of the Defendants below under the Oklahoma Political Subdivision Tort Claims Act (Tr. 147-48).

The Plaintiff's truck, containing the stolen Eckhardt parts, was taken to the courthouse to be used as a possible exhibit during the trial (Tr. 84). Prosecutor Moore decided against using the truck as an exhibit, however, because of the difficulty of getting the truck up the three flights of stairs to the courtroom and marking and admitting it as an exhibit at trial. (Tr. 311-13).

After trial, Ed Moore informed the Sheriff, who had custody of the Plaintiff's truck containing the stolen Eckhardt parts, that he did not see anything

wrong with letting the Eckhardts remove their stolen property as long as some precaution was taken that they took only their property or at least had an opportunity to further make sure that the engine was in fact theirs (Tr. 314). The stolen Eckhardt engine had been rebuilt and customized by Ronnie Eckhardt to contain a Coors beer can shim in part of the engine (Tr. 314). Therefore, Ed Moore arranged with the Plaintiff's brother, Lewis Lavicky, who owned a garage to permit the Eckhardts to remove their property from the Plaintiff's truck (Tr. 315-16). Ed Moore informed Plaintiff's counsel of this arrangement which had been made with the Plaintiff's brother (Tr. 316). Neither prosecutor Moore nor the Sheriff applied to the magistrate to determine the ownership of the property pursuant to 22 O.S. § 1322.

The Eckhardts removed the engine, transmission and rear wheels which had

originally belonged to them from the Plaintiff's truck (Tr. 213). Upon inspection, the Eckhardts discovered the distinctive Coors beer can shim which Ronnie Eckhardt had incorporated into the stolen engine (Tr. 214). Earlier, in March of 1979, the Eckhardts had inspected the Plaintiff's truck after it had been impounded in Enid, Oklahoma, in the presence of Deputy Bob Burnett and had found their stolen carburetor, valve covers, transmission, rear wheels and 1963 Chevrolet Impala short block engine which had been incorporated in the Plaintiff's truck (Tr. 209-11). On January 22, 1980, Alfalfa County Undersheriff Sam Otis called Plaintiff's criminal defense lawyer to say that the Plaintiff could pick up his truck, minus the recovered Eckhardt parts, at the Alfalfa County barn (Tr. 134).

REASONS FOR GRANTING PETITION

PROPOSITION I

THE COURT BELOW DECIDED THIS CASE ON A THEORY SPECIFICALLY REJECTED BY THIS COURT IN HUDSON V. PALMER

Last year this Court held that an unauthorized, intentional deprivation of property by a state employee does not constitute a violation of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivational remedy for the loss is available. Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 3204 (1984). This reasoning followed the Court's earlier decision under Parratt v. Taylor, 451 U.S. 527, 541 (1981), where the Court held that a negligent property loss occasioned by a random, unauthorized act, rather than by an established state procedure, was not a deprivation "without due process of law" where the State provided an adequate post-deprivation remedy.

In Hudson the Court noted that for intentional as well as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. Id., 468 U.S. at ___, 104 S.Ct. at 3204, n. 14. In this regard, this Court went on to reject the very theory upon which the Court below decided the present case. In doing so, this Court used the following language:

> Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property "**can** provide predeprivation process, then as a matter of due process he must do so." Brief for Respondent 8 (emphasis in original). This argument reflects a fundamental misunderstanding of Parratt. There we held that post-deprivation procedures satisfy due process because the **State** cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position

to provide for predeprivation process.

Id., 468 U.S. at ___, 104 S.Ct. at 3204 (bold emphasis original; other emphasis added). Therefore, the emphasis clearly is upon the practicability of a pre-deprivation hearing by the State, and not at all the practicability of pre-deprivation process from its employees who are defendants in a lawsuit.

The Court below cited the foregoing language. Lavicky v. Burnett, 758 F.2d at 473. After acknowledging that the controlling inquiry is solely whether the State is in a position to provide predeprivation process, the Court below immediately turned its attention from the State to the conduct of the individual Defendants. The Court below then concluded that the actions of the individual Defendants could not be characterized as random or unauthorized because the Defen-

dants could have given Plaintiff a hearing but did not. Id., 758 F.2d at 473.

However, their conduct was "random and unauthorized" from the point of view of the State of Oklahoma which had established a statutory procedure for determining ownership of stolen property. 22 O.S.1981, §§ 1321 -1322. Indeed, there is no conceivable way the State of Oklahoma could anticipate or forestall the failure of state actors to follow the statutory procedure, whether that failure is negligent or intentional. The State is simply not in a position to provide for pre-deprivation process before its employees disposed of the truck without following the proper statutory procedure. Parratt and Hudson were intended for just such circumstances as this.

The Court below found that the action of the Defendants, planned and authorized, is not the sort of action for which post-deprivation process will suf-

fice, citing Logan v. Zimmerman Brush Company, 455 U.S. 422, 436-37 (1982), and Augustine v. Doe, 740 F.2d 322, 327-29 (5th Cir. 1984). Lavicky, 758 F.2d at 473. This Court distinguished the facts in the Logan case from the Parratt case by noting that Parratt dealt with the tortious loss of property as a result of a random and unauthorized act by a state employee, and not as a result of an established state procedure; whereas, in Logan, the state system itself destroyed a complainant's property interest by operation of law when a state agency failed to convene a timely conference. Logan, supra, 455 U.S. at 435-36. In the present case, it cannot fairly be said that Ed Moore's actions, whether negligent or intentional, deprived the Plaintiff of his truck by operation of law. Quite the contrary, Oklahoma law provided for a hearing before determining ownership of stolen property. Instead,

Ed Moore's activities clearly fall within the scope of Parratt and Hudson in that his actions were the unauthorized failure of state employee to follow the proper procedures.

There is no principled distinction between the destruction of the Plaintiff's property in Hudson and the return of the stolen property to its rightful owners by Ed Moore. In each case, a state employee acted in a way unauthorized by state law. In each case, a state employee acted in a way which the state governments could not anticipate or forestall. Therefore, the Court of Appeals' reliance upon the Logan case is misplaced. Remembering that the Fourteenth Amendment protects against deprivations of property by the State without due process of law, the focus must necessarily be upon process afforded by the State, rather than the employee. This is the teaching of Parratt and Hudson, which

the Court below ignored while citing this Court's very language on the question.

The court below has already relied upon Lavicky to find a constitutional violation in a second case in which an Oklahoma Prosecutor returned stolen property to its rightful owner without a formal hearing. Wolfenbarger, d/b/a Shady Sam's Pawn Shop v. Williams, et al., No. 83-2331, slip op. at 15-17 (10th Cir. Sept. 26, 1985) (claim of pawnbroker to whom stolen property had been pledged). However, Judge Seth dissented on substantially the same theory asserted herein saying:

> I also no longer agree with the majority opinion in Lavicky v. Burnett, 758 F.2d 468 (10th Cir.), relied on by the majority opinion herein, although I was on the panel in that case, since I now see the error of my ways.

Wolfenbarger, supra. dissent slip op. at 1. Thus, at least one judge deciding the opinion below has unambiguously abandoned it.

The adoption of the wrong theory by the Court of Appeals leaves public officials throughout the Tenth Circuit at jeopardy from unnecessary federal litigation where the states of that circuit provide constitutionally adequate post-deprivation remedies. It literally results in making federal cases of simple matters which, as here, deal only with the ownership and disposition of property. State courts and administrative procedures have ample experience in deciding such questions. The Court below implicitly found the Oklahoma Political Subdivision Tort Claims Act, 51 O.S. 1981, § 151 et seq. to be a satisfactory post-deprivation remedy. Lavicky v. Burnett, 758 F.2d at 472. The statute in effect at the time of the event herein, 51 O.S. Supp. 1978, § 153, made each political subdivision liable for the torts of its employees acting within the scope of their employment. Further, 51 O.S.

Supp. 1978, § 162(a)(2) required political subdivisions to pay any judgments entered against an employee along with costs or fees for the violation of the property rights or any rights, privileges or immunities secured by the Constitution. Further, 74 O.S. Supp. 1976, § 20f(F) provides that any state officer or employee who acts outside the scope of his official authority is liable in damages in the same manner as any private citizen. In addition, albeit after the event in question, the Oklahoma Supreme Court has created a common law right of action for Constitutional violations in Oklahoma courts. Prock v. District Court of Pittsburg County, 630 P.2d 772, 779 (Okl. 1981). Finally, normal remedies such as writs of replevin or tort suits for conversion would be applicable in cases such as the one at hand. Clearly, the State of Oklahoma has provided a pan-

oply of post-deprivation remedies for such cases. As a final aside, the court below rejected, or overlooked, the substantive property law of Oklahoma which states that in cases in which one willfully uses the materials of another without consent (as here), the product belongs to the owner of the material, if its identity can be traced (as here). See 60 O.S. 1981 § 347. Thus, when David Lavicky blended the stolen Eckhardt parts with his own truck chassis he lost ownership of the whole and had no property interest to protect.

In light of these remedies, the Court below seriously erred in finding a Fourteenth Amendment violation. The effect of this error is virtually to write Hudson out of existence in the Tenth Circuit. Governmental officials, already besieged by civil rights litigation, have a right to rely upon this Courts' interpretation of the Fourteenth Amendment and

have claims heard, where appropriate, in state courts. Such reliance on adequate post-deprivation remedies in state courts would have the additional benefit of reducing overcrowded federal dockets and making state courts more aware of federal constitutional questions.

Lest the Court think the present case is an isolated phenomenon, Ed Moore would invite the Courts' attention to cases from the Tenth Circuit which have apparently also written this Courts' opinion in Ingraham v. Wright, 430 U.S. 651 (1977) off the books. That case held, on facts there present, that where the state had preserved what had always been the law of the land regarding post-deprivation remedies, some deprivation of liberty required no predeprivation process. Id., 430 U.S. at 679 n. 47. However, in Lusby v. T.G.& Y. Stores, 749 F.2d 1423, 1434 (10th Cir. 1984), a case involving the deprivation of liberty, the Tenth

Circuit stated that no post-deprivation remedy in the form of damages can ever fully compensate for time wrongfully spent in custody. The Tenth Circuit used even stronger language in Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 n. 4 (10th Cir. 1985), when it stated that where a deprivation of life or liberty is involved, no post-deprivation state remedy in the form of damages can ever provide a meaningful hearing to the victims so as to satisfy procedural due process. While reasonable people might disagree on whether Ingraham should be extended beyond the facts there present, the categorical language found in Hewitt and Lusby effectively overrule this Courts' opinion for the states of the Tenth Circuit.

Further, while the court below relied on the fact the Defendants did not follow state policy in disposing of property, this Court in Ingraham held post depriva-

tion remedies adequate even where there was evidence of violation of state policy favoring consultation with the principal before paddling school children. Compare Ingraham v. Wright, 430 U.S. at 657 and 682, with Lavicky v. Burnett, 758 F.2d at 473. The court below also ignored this Court's actions in Lehman v. Weis, 454 U.S. 807 (1981), remanding a case in which a Forest Service employee failed to follow proper procedures in disposing of apparently abandoned property to the Court of Appeals in light of Parratt. On remand the Ninth Circuit directed the trial court to consider facts to determine the applicability of Parratt, which had not yet been extended by Hudson. Weiss v. Lehman, 676 F.2d 1320, 1323 (9th Cir. 1982). As we suggest again, the crucial inquiry is not whether a procedure is followed, but whether the State itself could anticipate the official's failure to follow it.

Clearly, the Tenth Circuit is out of step with this Courts' pronouncements in Ingraham, Parratt and Hudson. Ed Moore respectfully requests this Court to grant the Writ of Certiorari, review the Courts' actions below and reverse them.

PROPOSITION II

THE OPINION BELOW IS IN CONFLICT WITH SIMILAR AUTHORITY FROM THE SIXTH CIRCUIT.

In Wagner v. Higgins, 754 F.2d 186 (6th Cir. 1985), the Court of Appeals dealt with an allegation by a convicted criminal defendant (as here) that his automobile, seized by police officers, had been stripped. Id., 754 F.2d at 191. Therein the Court noted that remedies at state law including conversion and an application to the state criminal trial judge for return of property were available. In light of these remedies, the Sixth Circuit applied Parratt and Hudson to hold there was no deprivation of pro-

perty without due process of law. Wagner v. Higgins, 754 F.2d at 192.

The similarity of fact circumstances is clear. In both cases cars were seized in connection with criminal proceedings. In both cases it was alleged that the vehicles were stripped or property taken from them. In both cases the Defendants argued that state post-deprivation remedies were adequate. However, the Sixth Circuit in Wagner followed this Courts' precedent in Parratt and Hudson whereas the Tenth Circuit below chose to adopt a theory this Court specifically rejected. Public servants in both circuits deserve a clear pronouncement by this Court regarding which theory of due process is to be the law of the land. Finally, Ed Moore could cite to the Court numerous cases from other circuits in which this Courts' teachings from Parratt and Hudson have been applied to conduct which could be considered "planned and authorized."

The fact that the Tenth Circuit has chosen in this case to avoid applying the teachings of Parratt and Hudson to these facts indicates that the Tenth Circuit is not only out of step with this Court but with the overwhelming weight of authority from the other Courts of Appeals.

CONCLUSION

For the reasons stated, Ed L. Moore respectfully asks this Court to grant the Petition for Writ of Certiorari and review, and reverse, the opinion of the Court below.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL
DIVISION
112 State Capitol Building
Oklahoma City, Oklahoma 73015
(405) 521-3921

ATTORNEYS FOR RESPONDENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 82-1969, 82-1998 and 82-1999

DAVID LAVICKY,

Plaintiff-Appellee and Cross-Appellant,

v.

BOB BURNETT, Deputy Sheriff of Garfield County, et al.,

Defendants-Appellants and Cross-Appellees.

March 19, 1985

OPINION

LOGAN, Circuit Judge:

These appeals arise from a jury verdict granting plaintiff David Lavicky damages for violations of his Fourth and Fourteenth Amendment right to be free from warrantless searches and seizures and for violations of his Fifth and Four-

teenth Amendment right not to be deprived of property without due process of law. The jury awarded plaintiff compensatory damages of $300 and punitive damages of $250 against each defendant. The trial court, however, granted defendants' motion for judgment n.o.v. on the issue of punitive damages. Plaintiff alleged violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. On appeal we analyze the case only under 42 U.S.C. § 1983, because there are insufficient allegations of a racial or other class-based conspiracy to support the 42 U.S.C. §§ 1985(3) and 1986 claims. See Santistevan v. Loveridge, 732 F.2d 116, 117-18 (10th Cir. 1984).

All defendants claim on appeal that: (1) plaintiff was not deprived of due process; (2) plaintiff is collaterally estopped from asserting a Fourth Amendment violation because the state

court declined to suppress the seized evidence at his criminal trial; and (3) defendants did not violate plaintiff's Fourth Amendment rights. In addition, defendant Deputy Sheriff Bob Burnett claims he should not have been found liable because of his qualified immunity as a deputy sheriff. Defendant Undersheriff Sam Otis claims that the trial court erred by not granting his motions for directed verdict and judgment n.o.v. based on his tenuous involvement in the vehicle search and seizure. Defendant Sheriff Delmar Coppock claims that the trial court erred by not granting his motion for judgment n.o.v. for the same reason. Finally, defendant prosecutor Ed L. Moore claims he should be absolutely immune from suit as a prosecutor. Plaintiff cross-appeals, claiming that the trial court erred in

granting the judgment n.o.v. denying his punitive damage award.

On March 15, 1979, Deputy Sheriff Burnett arrested plaintiff while plaintiff was working on his pickup truck at his home in Enid, Oklahoma, in Garfield County. Burnett had an arrest warrant which had been issued in Alfalfa County in connection with the larceny of an automobile owned by Bruce and Ronnie Eckhardt of Alfalfa County. Burnett testified that while making the arrest he observed parts from the stolen Eckhardt truck, particularly the carburetor and valve covers, on plaintiff's pickup. At the time of the arrest Burnett neither seized nor searched the pickup. Instead, the next morning, without obtaining a warrant, Burnett arranged to have plaintiff's pickup towed to Franklin Motors in Garfield County. Burnett testified that Undersheriff Otis assisted

him in towing the pickup. Later in the day Burnett, Otis and Ronnie and Bruce Eckhardt conducted a warrantless search of plaintiff's pickup at Franklin Motors.

On approximately March 21, 1979, Tom Kent, a tow-truck operator, met with Otis, and Kent then towed plaintiff's vehicle from the Franklin Motors Garage to Kent's garage in Helena, Alfalfa County, where he stored it. The pickup was brought to the Alfalfa County courthouse for plaintiff's larceny trial and was returned to Kent's garage after one day at the courthouse. Neither the pickup, nor any parts of the truck, were introduced into evidence during the criminal trial. During the trial the prosecution did attempt to enter into evidence a screwdriver set found in the pickup, but the court ruled it inadmissible.

A state court jury convicted plaintiff of larceny of an automobile. On the day the court sentenced plaintiff for automobile larceny his attorney asked prosecutor Moore if plaintiff could obtain his pickup truck from the county. Moore told plaintiff's attorney that his truck could be returned as soon as the Eckhardts claimed their parts from it. In order to allow the Eckhardts to claim their parts, defendants Moore, Coppock and Otis arranged to have the pickup towed to a garage in Cherokee, Oklahoma. The Eckhardts removed the parts that they believed were theirs and then the owner of the Cherokee garage called Sheriff Coppock to have the pickup returned to Kent's garage. Otis then informed plaintiff's attorney that plaintiff could claim his truck. After plaintiff observed that the tires and wheels had been taken the engine, transmission, and

stereo were gone, the seats and carpets were torn and the entire truck was essentially stripped, he filed this civil rights action against defendants for the alleged constitutional violations arising out of these events.

I

DUE PROCESS CLAIM

Defendants argue that Plaintiff may not bring a § 1983 claim for deprivation of property without due process because plaintiff had a postdeprivation remedy under the Oklahoma Political Subdivision Tort Claims Act, Okla.Stat.Ann. tit. 51, §§ 151-170, which would provide constitutionally adequate procedural due process. Although we agree that postdeprivation state remedies can provide adequate process for some intentional deprivations, we do not agree that plaintiff in this case should be restricted to his postdeprivation remedy.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2nd 420 (1981), the Supreme Court held that the Due Process Clause is not violated when a state employee, by a random and unauthorized act, negligently deprives an individual of property, if the state makes available meaningful postdeprivation remedy. Hudson v. Palmer, __ U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), extended that rule to random and unauthorized intentional conduct of state employees.[1]

In Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982),this court, interpreting

[1]If Parratt and Hudson are applicable to the instant case they apply only to the procedural due process claims under the Fifth and Fourteenth Amendments. They do not apply to violations of substantive constitutional proscriptions under the Fourth Amendment. See Parratt, 451 U.S. at 536, 101 S.Ct. at 1913; Hudson, ___ U.S. at ___ n. 4, 104 S.Ct. at 3208 n. 4 (Stevens, J., concurring and dissenting); Augustine v. Doe, 740 F.2d 322, 325-27 (5th Cir. 1984).

Parratt, held that a prisoner may assert a § 1983 cause of action for deprivation of property without due process when the state retained money, not used as evidence, that it had seized from the prisoner. We said:

> It might have been impractical for the State to give Mr. Coleman a hearing before it seized the money during his arrest. However, the deprivation Mr. Coleman challenges is not the seizure of the money, but its retention by the State until his execution. A hearing to determine the propriety of this retention is not impractical.

Id. at 1344.

The Supreme Court's ruling in Hudson does not overrule our Coleman decision. The Court in Hudson, applying the rationale of Parratt to intentional torts, reasoned that a state could not anticipate its employees' "random and unauthorized" intentional conduct any more than it could anticipate similar negligent conduct. ___ U.S. at ___, 104 S.Ct. at 3203. Consequently, it was similarly

impractical for a state to be required to hold predeprivation hearings for "random and unauthorized" intentional conduct. Id. Furthermore, the Court rejected prisoner Palmer's argument that postdeprivation hearings do not provide a meaningful remedy when an agent of a state could have held a predeprivation hearing. The Supreme Court concluded: "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id.

In the instant case, the defendants' conduct in disposing of the pickup could not be characterized as the sort of random or unauthorized action that may be remedied by postdeprivation hearings. The record reveals that plaintiff's attorney approached prosecutor Moore requesting

return of the vehicle after the larceny trial. Moore responded that the plaintiff's truck would be returned after the Eckhardts received their stolen parts. Coppock and Otis coordinated the dealing with the Eckhardts and arranged the recovery of the parts the Eckhardts claimed to be theirs. These actions constitute an intentional deprivation that may not be characterized as random. Moreover, Moore indicatd that he believed, as a policy matter, that he had the duty to turn over the allegedly stolen parts to the Eckhardts without a hearing. This action, planned and authorized, is not the sort of action for which postdeprivation process will suffice. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37, 102 S.Ct. 1148,1158-59, 71 L.Ed.2d 265 (1982); Augustine v. Doe, 740 F.2d at [illegible]-29.

In this case, as in Coleman, it was not impractical for the state officials to hold a hearing to determine the ownership of the truck and its parts before its disposition, indeed Oklahoma law already has a framework, which the officials have ignored, for determining ownership of allegedly stolen property prior to its disposition. An Oklahoma statute on seized stolen property provides that "[w]hen property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof." Okla.Stat.Ann. tit. 22, § 1321 (footnote omitted). The following section provides:

> On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or

> embezzling the property, may order it to be delivered to the owner....

Okla.Stat.Ann. tit. 22, § 1322. Given the existence of this statutory framework and the planned nature of defendants' actions, we conclude that plaintiff's procedural due proces rights in the disposition of his pick-up and its parts were violated.

II

COLLATERAL ESTOPPEL

Defendants correctly assert that the doctrine of collateral estoppel may preclude plaintiff from litigating a Fourth Amendment issue in a § 1983 action if a state court has decided that same issue in previous litigation. See Allen V. McCurry, 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980); Searing v. Hayes, 684 F.2d 694, 697 (10th Cir. 1982) (per curiam). Defendants specifically argue that because the state trial court

refused to suppress the evidence gathered in the search of plaintiff's pickup, plaintiff is collaterally estopped from relitigating the Fourth Amendment illegal search and seizure issue in this § 1983 action. Although we recognize that the state trial court did deny plaintiff's pretrial suppression motion, in light of the court's later decision to exclude the only evidence offered at trial from that search, that pretrial order does not preclude plaintiff's Fourth Amendment claim here.

The state trial judge expressed doubt during the trial regarding the validity of his earlier ruling refusing to suppress the items seized by police. Plaintiff's attorney at the larceny trial objected when the prosecutor attempted to introduce a screwdriver set taken from the pickup after its seizure. The court suppressed the proffered evidence,

despite its earlier decision. Pl.Ex. 13. Although the court's basis for suppressing this evidence is unclear, it appears that the court was not convinced that defendants had adhered to Fourth Amendment search and seizure standards.[2]

[2]The court said:

> I don't think this is admissible, the search instance, the arrest he was taken with him that evening. At the time I heard this Motion before it was my understanding that virtually everything on his car was off this stolen car but now it eviedently [sic] it wasn't. I am going to suspress [sic] that, the screw drive [sic] set, would you pick it up and put it back over there.

Thus, we cannot say as a matter of law that the illegality of defendants' search and seizure activities was "distinctly put in issue and directly determined" by the Oklahoma state trial court in its suppression decisions. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569, 71 S.Ct. 408, 414, 95 L.Ed. 534

(1951). Without that court's definite determination that evidence need not be suppressed despite allegations of a Fourth Amendment violation, defendants may not use collateral estoppel to preclude plaintiff's litigation of the Fourth Amendment claims in this § 1983 action.

III

FOURTH AMENDMENT EXCEPTIONS TO THE WARANT REQUIREMENT

Plaintiff's recovery upon his Fourth Amendment claim depends upon whether defendants acted unlawfully when they towed, impounded, and searched his vehicle without a warrant the day after his arrest for automobile larceny. The underlying premise of the Fourth Amendment is that warrantless searches and seizures are per se unreasonable for a few narrowly defined exceptions. Arkansas v. Sanders, 442 U.S. 753, 758-

59, 99 S.Ct. 2586,2589-91, 61 L.Ed.2d 235 (1979); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2031-32, 29 L.Ed.2d 564 (1971) (plurality opinion). Plaintiff has a cognizable constitutional claim for defendants' actions if those actions do not fall within one of the warrant requirement exceptions.

Defendants argue that the warrantless seizure of plaintiff's truck the day after his arrest was proper under the search incident to arrest exception, United States v. Edwards, 415 U.S. 800, 802, 94 S.Ct. 1234, 1236, 39 L.Ed.2d 771 (1974); Chimel v. California, 395 U.S. 752, 755-65, 89 S.Ct. 2034, 2035-41, 23 L.Ed.2d 685 (1969), and under the plain view doctrine, Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (per curiam). We discuss each exception separately.

Under the search incident to arrest exception, a police officer, incident to an arrest, may search a person "and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. Chimel, 395 U.S. at 768, 89 S.Ct. at 2043. Because Burnett arrested plaintiff while he was working on his pickup, Burnett could have seized any evidence of stolen parts that were within the immediate area at the time of arrest. Burnett, however, did not seize the vehicle at the time of arrest; instead, he waited overnight before acting.

The search incident to arrest exception i. not applicable to this case. The exception protects the arresting officer and prevents the concealment or destruction of evidence within the arrested person's immediate control at the time of arrest. Chimel, 395 U.S. at

762-63, 89 S.Ct. at 2039-40. A necessary corollary of this rationale is that a valid search incident to arrest requires the search and arrest to be substantially contemporaneous. United States v. Davis, 423 F.2d 974, 979 (5th Cir.), cert. den., 400 U.S. 836, 91 S.Ct. 74, 27 L.Ed.2d 69 (1970). In this case the search was not substantially contemporaneous and therefore may not be validated under that exception.

We recognize that the Supreme Court has allowed delayed warrantless searches of automobiles taken into custody at the time of arrest and of packages taken from automobiles at the time of arrest. See United States v. Johns, ___ U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). Nevertheless, the automobile exception does not apply. The pickup was partially dismantled, and it was on private property, not on a public way.

Furthermore, it was not taken into custody at the time of the arrest. This fact distinguishes United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), relied upon by defendants. In Edwards the Court upheld a warrantless search and seizure of defendant's clothing the morning after his custodial arrest. Id. at 803-04, 808, 94 S.Ct. at 1237-38, 1239. But the officers had custody of defendant, as well as defendant's clothing, from the time of arrest until the time of seizure. The defendants in the instant case did not take the truck into custody at the time of Plaintiff's arrest and thus cannot argue that their actions were merely a matter of search evidence of which they had custody.

Defendants also argue the subsequent seizure of the pickup was justified because at the time of arrest the stolen

parts were within Burnett's plain view. By waiting until the next day to seize the pickup, however, defendants fail to satisfy the inadvertence requirement of the plain view doctrine. See United States v. Tolerton, 669 F.2d 652, 654 (10th Cir.), cert. denied, 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 473 (1982). Burnett knew the exact location of plaintiff's truck the day after plaintiff's arrest and thus cannot argue that the seizure was inadvertent. As the Supreme Court noted in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), when the police know in advance the location of evidence that they intend to seize, "The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se

unreasonable' in the absence of 'exigent circumstances.'" Id. at 470-71, 91 S.Ct. at 2040 (emphasis in original).

IV

Qualified Immunity

Defendant Deputy Sheriff Burnett argues that even if his actions in seizing the truck violate the Fourth Amendment, he cannot be held liable if those actions were taken in good faith. Burnett possesses qualified immunity from liability under § 1983 if he proves that he did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We have recently approved a jury instruction similar to the one used by the trial court in the instant case. Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984). We believe that the evidence

presented could support a jury finding that a reasonable police officer would have known that he was violating the plaintiff's Fourth Amendment rights by seizing the truck without a warrant under the circumstances involved in this case. Therefore, we reject defendant Burnett's argument of qualified immunity.

V

Sufficiency of the Evidence

Defendant Burnett argues that he is not liable to plaintiff because there is no evidence that his actions caused any damage to plaintiff's truck. We reject this argument. Plaintiff is not merely suing for the actual damage to his pickup; he is suing for the violation of his constitutional rights. The purpose of § 1983 is to compensate persons for injuries caused by deprivations of their constitutional rights. Here there was a violation of plaintiff's right to be free

from unreasonable searches and seizures, and, as a result, he may recover damages for that violation. See Corriz v. Naranjo, 667 F.2d 892, 897 (10th Cir. 1981), cert. dismissed, 458 U.S. 1123, 103 S.Ct. 5, 73 L.Ed.2d 1394 (1982); Smith v. Heath, 691 F.2d 220, 226 (6th Cir. 1982); cf. Hostrop v. Board of Junior College, District No. 515, 523 F.2d 569, 579 (7th Cir. 1975) (citing cases awarding damages in civil rights cases where no pecuniary loss shown), cert. denied, 425 U.S. 963, 93 S.Ct. 1748, 48 L.Ed.2d 208 (1976).

Defendants Otis and Coppock claim that the trial court erred in not granting their motions for a directed verdict or for judgment n.o.v. A court determining whether to grant such motions must determine whether there is evidence upon which the jury properly could find for the non-moving party. Brown v.

McGraw-Edison Co., 736 F.2d 609, 612-13 (10th Cir. 1984). The appellate court applies the same standard in reviewing a motion for a judgment n.o.v. as the trial court.

We believe the trial court here correctly denied Undersheriff Otis' motions. Plaintiff presented evidence at trial upon which a jury could have found Otis liable under § 1983. Burnett testified that Otis assisted with the seizure of plaintiff's truck, and that Burnett, Otis and the Eckhardts, on the morning of the seizure, conducted a warrantless search of the truck. There was also evidence of Otis's involvement in the disposition of the pickup: he allowed the Eckhardts to remove any part of the truck they claimed to be theirs without a prior hearing to determine ownership, and he did not claim that his actions were in

reliance upon prosecutor Moore's legal advice.

We also believe Sheriff Coppock's motion for judgment n.o.v. was properly denied. Sheriff Coppock claims that he relied upon prosecutor Moore's advice and acted under Moore's direction. If the sheriff's duty is unclear, it should be a defense that he relied upon the advice of the prosecuting attorney's office. But the law Sheriff Coppock should have followed is clear here. When allegedly stolen property comes into his custody "he must hold it subject to the order of the magistrate authorized...to direct the disposal thereof." Okla.Stat.Ann. tit.22, § 1321. Further, Coppock has been sheriff for sixteen years, and during that time no doubt had in custody many items of allegedly stolen property that he should have handled under this statute. Under those circumstances we

think the jury could properly find him liable for releasing the allegedly stolen parts of the truck to the Eckhardts without a magistrate's order.

VI

Prosecutorial Immunity

We agree with defendant Moore's assertion that he cannot be held liable for the illegal seizure and search of plaintiff's truck. We disagree, however, with his assertion that he is absolutely immune, as a prosecutor, for his actions in allowing the Eckhardts to claim parts from plaintiff's truck without a hearing to determine ownership of those parts.

Moore argues that his actions in disposing of plaintiff's pickup were necessarily a part of his initiation and presentation of the state criminal case against plaintiff, and thus he is absolutely immune from liability for any violation resulting from those actions.

See Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). But as we said in Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982), when the prosecutor managed "the post-trial disposition of seized property not used as evidence that the State did not intend to keep...[he] was acting as an administrator, not as an advocate." Id. at 1346 (footnote omitted). Thus, Moore may not rely on his prosecutorial role to provide absolute immunity for his acts in disposing of the parts of the pickup. Instead, Moore has only a qualified immunity to shield him from liability for his actions. Id. From our examination of the record, applying the Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), qualified immunity standard, we hold that the jury properly could have found that Moore should reasonably have known that

allowing the Eckhardts to remove parts from plaintiff's truck without a hearing violated plaintiff's constitutional rights.

VII

Punitive Damages

The trial court granted defendants' motion for judgment n.o.v. on the issue of punitive damages. We recognize that an award of punitive damages involves a "discretionary moral judgment" by the fact finder, see Smith v. Wade, 461 U.S. 30, 52, 103 S.Ct. 1625, 1638, 75 L.Ed.2d 638 (1983), and thus an award, reasonable in amount, made by the jury should not be set aside unless the issue should not have been submitted to the jury in the first place.

The trial court here, in setting aside the jury verdict stated that:

> Upon careful review of all of the evidence it is clear that the plaintiff's proof failed entirely

> to establish such ill will, desire to injure, reckless indifference or malice on the part of any defendant to support the submission of the issue of punitive dmages to the jury. The mistake in judgment in the performance of their respective duties subjected the defendants to actual damages, but such mistakes fell far short of the type of aggravated circumstances required for the award of punitive damages under the applicable authorities.

R. III, 803. The court cited, in support, Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976). In Silver, we affirmed a punitive damage award based on proof that a public official had manifested "reckless indifference to the property rights of others, ill will, a desire to injure or malice." Id. at 163. The Supreme Court recently reaffirmed this standard for punitive damages when it held "that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless

or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. at 56, 103 S.Ct. at 1640. Thus, the trial court used a proper standard in determining the appropriateness of an award of punitive damages.

We have carefully reviewed the record. The trial court correctly states that these defendants made mistakes in judgment sufficient to hold them liable for actual damages. We have affirmed the findings that defendants should have realized they were violating Fourth, Fifth and Fourteenth Amendment rights of plaintiff in the warrantless seizure and search of his truck and in allowing parts to be taken from the truck without providing plaintiff a predeprivation hearing. Nevertheless, we believe the trial court was correct that there was no evidence of malice, wantonness or

oppressiveness to justify punitive damages. Officials cannot be held for punitive damages simply because they did not know the rules of conduct they should follow. Simple ignorance of the applicable legal rules, even arrogant ignorance, does not by itself indicate reckless or callous indifference to federally protected rights.

AFFIRMED.

APPENDIX B

MAY TERM - JULY 26, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges

DAVID LAVICKY,	)	
	)	
Plaintiff-Appellee,	)	
Cross-Appellant,	)	
vs.	)	Nos. 82-1998
	)	82-1999
BOB BURNETT,	)	
et al.,	)	
	)	
Defendant-Appellants	)	
Cross-Appellees.	)	

This matter comes on for consideration of Appellant Ed L. Moore's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Seth voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case

was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk